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**IN THE  
COURT OF APPEALS OF INDIANA**

WILLIAM JEFFREY TOTH,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 64A04-0607-CR-389

APPEAL FROM THE PORTER SUPERIOR COURT

The Honorable Mary R. Harper, Judge  
Cause No. 64D05-0512-FB-10854

**May 10, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

William Jeffrey Toth appeals his convictions of intimidation as a Class D felony,<sup>1</sup> possession of paraphernalia as a Class D felony,<sup>2</sup> and resisting law enforcement as a Class A misdemeanor,<sup>3</sup> and the finding he is an habitual offender.<sup>4</sup> He argues the trial court erred by admitting evidence obtained after a warrantless search of his residence and by allowing testimony of Toth's prior bad acts. Toth did not object to the admission of this evidence and has waived any allegations of error on appeal. Waiver notwithstanding, the trial court did not abuse its discretion in admitting the evidence. The evidence was sufficient to convict Toth of possession of paraphernalia. Toth also argues his sentence was "manifestly unreasonable"<sup>5</sup> and the trial court deprived him of "his Sixth Amendment right to a jury trial by aggravating his sentence based upon judicially found facts." (Appellant's Br. at 26.) The trial court did not err in sentencing him.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

In May 2005, Jackie Myers moved out of the home of her daughter, Jennifer Hayes, and into her own apartment. She began dating Toth about one month later and, in August 2005, moved into a house with Toth.

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<sup>1</sup> Ind. Code § 35-45-2-1.

<sup>2</sup> Ind. Code § 35-48-4-8.3.

<sup>3</sup> Ind. Code § 35-44-3-3.

<sup>4</sup> Ind. Code § 35-50-2-8.

<sup>5</sup> We no longer review sentencing decisions for manifest unreasonableness. Effective January 1, 2003, our Indiana Supreme Court amended Ind. Appellate Rule 7(B) to provide: "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

In October 2005, Hayes asked the Valparaiso Police Department to do a welfare check on Myers because Hayes had not heard from her mother in about a month and was worried about her Mother's relationship with Toth. Detective John Ross spoke with Myers while Toth was at work and offered to take Myers to a battered woman's shelter. Myers declined but agreed to think about it over the weekend.

When Detective Ross returned on Monday, a note taped to the door read: "Valparaiso Police Dept. My name is Jackie Myers and I do not want to be harrassd [sic] by anybody again. Please let my kids know I'm happy & not going anywhere. If they do not I will be filaning [sic] charges against anybody [sic]. Thank you. Jackie Myers." (State's Ex. 2.) Detective Ross spoke to Myers briefly, through the door, to confirm she had written the note and did not want to speak with him.

On December 17, 2005, Myers' sister Robin Taylor attempted to check on Myers. Toth eventually answered the door but would not allow Taylor to see Myers. He yelled at Taylor and slammed the door in her face. Taylor left and called Hayes, who called the police.

After talking with Taylor in a nearby parking lot, police officers went to the house to check on Myers' welfare. Officers knocked on the door and looked through windows to determine if anyone was home. No one answered the door. Officers noticed a large dog barking inside the house. At one point, Myers appeared in the doorway. Toth was standing behind her and had his hands on her waist. When one of the officers asked to speak to Myers, she said she was fine. Toth then pulled her back inside and shut the door.

When officers again attempted to speak to them, Toth opened a window next to the front door and told police to quit harassing them and to leave them alone. Toth stated everything was fine and slammed the window shut. Two officers remained on the front porch while another attempted to get a warrant to enter the house.

Before police could obtain a warrant, the front door opened and the dog ran out, barking and growling. When the dog charged, one of the officers shot it. Toth ran outside yelling and screaming because his dog had been shot. Officers grabbed Toth and wrestled him to the ground. When he refused to obey their commands to put his hands behind his back, police used a Taser to subdue him and then handcuffed him. Because he was wearing only a robe, Toth was taken back into the house before he was transported to jail.

Officer Dan Koepke was then able to speak with Myers inside the house. Myers was “very pale. Um, she was obviously physically not well. She appeared very distraught. Um, she had bruises on her arms, um, some scarring on her arms. Um, and just she did not look well.” (Tr. at 286.) Officer Koepke convinced Myers she needed to be checked out by paramedics. After the paramedics arrived, they collected her medications from the bathroom. Myers then told them the medication she had taken that day was in the bedroom. Officer Koepke went into the bedroom to get that medication and found what appeared to be drug paraphernalia next to the medication: “Um, the glass pipe was one that I found next to the medication, and while I was still looking for the

medication there was a baseball hat next to the medication. I moved the baseball hat and the brass pipe was underneath that baseball hat.”<sup>6</sup> (*Id.* at 289.)

The State charged Toth with domestic battery with a prior conviction as a Class D felony,<sup>7</sup> intimidation as a Class D felony, possession of paraphernalia with a prior conviction as a Class D felony, resisting law enforcement as a Class A misdemeanor, criminal deviate conduct as a Class B felony,<sup>8</sup> intimidation as a Class C felony,<sup>9</sup> battery as a Class C felony,<sup>10</sup> and criminal confinement as a Class D felony. The State also alleged Toth was an habitual offender.

Toth filed a motion to suppress “any and all evidence seized at the residence [and] any and all witness or victim statements gained as a result of the unlawful entry.” (App. at 37.) The trial court denied the motion. A jury convicted Toth of intimidation, possession of paraphernalia, resisting law enforcement and being an habitual offender, but acquitted him of the other charges.

The trial court sentenced Toth to three years for intimidation, one-and-one-half years for possession of paraphernalia,<sup>11</sup> and one year for resisting law enforcement. The court attached an habitual offender enhancement of four-and-one-half years to the

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<sup>6</sup> Toth makes no argument it was improper for the officer to move the hat.

<sup>7</sup> Ind. Code § 35-42-2-1.3.

<sup>8</sup> Ind. Code § 35-42-4-2.

<sup>9</sup> Ind. Code § 35-45-2-1.

<sup>10</sup> Ind. Code § 35-42-2-1.

<sup>11</sup> The trial court initially sentenced Toth to three years for the possession conviction. It reduced the sentence to the advisory term of one-and-one-half years, *sua sponte*, after our decision in *White v. State*, 849 N.E.2d 735 (Ind. Ct. App. 2006) (addressing use of advisory sentences in consecutive sentencing), *reh’g denied, trans. denied*.

intimidation conviction. The trial court ordered the sentences served consecutively for an aggregate sentence of ten years.

## **DISCUSSION AND DECISION**

Toth challenges the admission of evidence seized during a warrantless search of his house, the admission of testimony he “snapped [the] necks” of two people in Florida, (Tr. at 151), the sufficiency of the evidence supporting his conviction of possession of paraphernalia, and his sentence.

### **1. Evidence Seized At The House**

Toth moved to suppress evidence discovered in the house, which motion the trial court denied. Toth did not object to the admission of the evidence. “Failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal.” *Lewis v. State*, 755 N.E.2d 1116, 1122 (Ind. Ct. App. 2001). Accordingly, this issue is waived. Waiver notwithstanding, the evidence was properly admitted.

Because Toth did not seek interlocutory review of the denial of his motion to suppress but appeals following trial, the issue is “appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial.” *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Id.* We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court’s ruling. *Id.* However, we must also consider the uncontested evidence favorable to the defendant. *Id.*

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures.

It is axiomatic that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” A principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter a residence for purposes of search or arrest. Thus, searches and seizures inside a home without a warrant are presumptively unreasonable.

*State v. Straub*, 749 N.E.2d 593, 597 (Ind. Ct. App. 2001) (internal citations omitted).

There are limited exceptions to the warrant requirement. *Baird v. State*, 854 N.E.2d 398, 404 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 597 (Ind. 2006). One is exigent circumstances. *Id.* “Under this exception, police officers may enter a residence or curtilage if the situation suggests a reasonable belief of risk of bodily harm or death, a person in need of assistance, a need to protect private property, or actual or imminent destruction or removal of evidence before a search warrant may be obtained.” *Id.*

When the police arrived at the residence to check on Myers’ welfare, they were aware Myers’ family was concerned about her relationship with Toth and had requested welfare checks on her in the past. They were also aware Toth had prevented Taylor from speaking to Myers, had yelled at Taylor, and had slammed the door in her face shortly before their arrival.

The officers repeatedly knocked on the door but received no answer from Toth or Myers. While at the scene, officers learned Toth “had been arrested several times and there were several violent offenses.” (Motion To Suppress Tr. at 25.) The officers saw Myers “in the door and she appeared to be in distress and was being told what to say and

being pulled back in the residence before we had open communication with her.” (*Id.* at 46.) Toth was standing directly behind Myers and had his hands near her waistline. Myers stated she was fine. However, when police attempted to talk to her, Toth pulled her back inside and shut the door.

When police knocked on the door again, Toth yelled through the window for them to leave. The door opened, a dog ran out, and the police shot it. Toth came outside, yelling and screaming because his dog had been shot. After subduing Toth, police entered the residence to check on Myers. Under the circumstances, officers had a reasonable belief Myers was a person in need of assistance when they entered the residence without a warrant.

Police were permitted to enter the residence, do a protective sweep, locate Myers, and determine her well-being. Generally, a search extending beyond the exigencies presented violates the Fourth Amendment. *Bryant v. State*, 660 N.E.2d 290, 301 (Ind. 1995), *cert. denied* 519 U.S. 926 (1996). However, another well-recognized exception to the warrant requirement under the Fourth Amendment is a voluntary and knowing consent to search. *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001). The scope of a consensual search is measured by its objective reasonableness. *Id.* at 964.

After the paramedics arrived, Myers told them she was on various medications, and paramedics retrieved some of the medications from the bathroom. Myers stated the medication she had taken that day was in the bedroom and Officer Koepke went into the bedroom to look for that medication.

Myers permitted Officer Koepke to enter the bedroom to retrieve her medication and he did not exceed the scope of that permission. He discovered the pipes on the dresser next to Myers' medication. The pipes appeared to be drug paraphernalia. Under the plain view doctrine, a police officer may seize items "when he inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location." *Jones v. State*, 783 N.E.2d 1132, 1137 (Ind. 2003).

Neither the warrantless entry into the house nor the subsequent discovery of drug paraphernalia in the bedroom violated Toth's rights under the Fourth Amendment. The trial court did not abuse its discretion in admitting this evidence.

2. Testimony of Prior Bad Acts<sup>12</sup>

Toth argues a portion of Myers' testimony was irrelevant evidence of Toth's bad character, and as such, was highly prejudicial and should have been excluded. The State argues Toth's statements to Myers "are connected with and part and parcel to the crime of intimidation." (Br. of Appellee at 16.)

Toth filed a motion *in limine* seeking to prevent Myers from testifying Toth had told her he hurt two people in Florida by snapping their necks, which motion the trial court denied after a hearing. Toth did not object to the testimony. "Failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error on appeal." *Lewis*, 755 N.E.2d at 1122. Accordingly, this issue is waived. Waiver notwithstanding, no fundamental error occurred.

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<sup>12</sup> Toth purports to quote from the trial court's order on his motion *in limine* but does not provide us with a pinpoint citation to the record. Our review of the appendices indicates this order was not included in the materials provided to us.

Toth was charged with intimidation. “A person who communicates a threat to another person, with the intent . . . that the other person be placed in fear of retaliation for a prior lawful act . . . [and] the threat is to commit a forcible felony” commits intimidation as a Class D felony. Ind. Code § 35-45-2-1. The probable cause affidavit specified Toth threatened Myers by “[s]tating if she left her home he would burn her family and kill her grandkids.” (App. at 24.)

Myers testified:

- Q. Why didn't you leave?  
A. Because I figured he would hurt my family if I left.  
Q. Why did you think that, though, Jackie?  
A. He told me that.  
Q. Why did you believe he would do it?  
A. I don't think he was in the right state of mind at the time. He was – he looked and sounded very violent. I did not trust him. I – I really believed he would hurt my family because he said no matter where I went he would find me.  
Q. Okay. Did you have reason to believe that he'd ever hurt anyone else?  
A. Yes, because he said he had.  
Q. What did he tell you?  
A. (No response.)  
Q. Jackie, look at me. What did he tell you?  
A. That he hurt two people in Florida.  
Q. What did he say he did?  
A. He said he snapped their necks.  
Q. Did you believe him?  
A. At the time I did, but he kept repeating it over and over and over so I – for a while I didn't. I thought it was just drinking talk, but the more he said it the more it sounded real to me. I mean because his attitude would look – his eyes with [sic] get real glassy and scary looking.  
Q. And you thought he had the ability to do that?  
A. Oh, yeah.  
Q. Did you think he was going to do that to your family?  
A. Yes.

(Tr. at 150-51.)

Ind. Evidence Rule 404(b) provides in part: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Evid. R. 403.

In assessing the admissibility of Evid. R. 404(b) evidence, a trial court must “(1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403.” *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002). We review a trial court’s decisions on the admission of evidence only for an abuse of discretion. *Id.*

Toth’s statement to Myers is relevant to what he intended when he told her he would harm her family if she left him. The statement explains why she took his threats against her family seriously and why she was afraid of him. Toth has not demonstrated the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Toth has not demonstrated fundamental error.

### 3. Sufficiency

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict and without weighing evidence or assessing witness credibility, a reasonable trier of fact

could conclude the defendant was guilty beyond a reasonable doubt. *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind. Ct. App. 2003).

To convict Toth of possession of paraphernalia, the State was required to prove Toth possessed “an instrument, a device, or other object that [he] intend[ed] to use for . . . introducing into [his] body a controlled substance.” Ind. Code § 35-48-4-8.3. Toth asserts: “While evidence was admitted that the Defendant was in possession of the pipes, there was no evidence that said pipes were ever used, or were intended to be used, for the introduction of illegal drugs into the Defendant’s body.” (Appellant’s Br. at 25.)

The jury was told such pipes are “typically used for smoking controlled substances.” (Tr. at 289.) Toth’s counsel asked Officer Koepke: “On December 17th when you asked [Myers] about the pipes, she told you that [Toth] smoked marijuana with those pipes, correct?” (*Id.* at 294.)<sup>13</sup> Officer Koepke answered, “Correct.” (*Id.*) Myers also told Officer Koepke at the scene the pipes “were [Toth’s] and that he used them to smoke marijuana.” (*Id.* at 300.) Myers testified at trial she and Toth smoked marijuana together about once a month. A jury could reasonably conclude Toth intended to use the pipes to smoke marijuana.

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<sup>13</sup> Counsel then asked Officer Koepke whether Myers had since told him Toth “only smoked tobacco with” the pipes. (Tr. at 295.) Although Officer Koepke confirmed Myers had made that statement “recently,” (*id.*), we consider only the evidence supporting the verdict. *Hawkins*, 794 N.E.2d at 1164. Defense counsel challenged the reliability and credibility of Myers’ testimony throughout the trial by highlighting the inconsistencies in her statements.

4. Sentencing<sup>14</sup>

Toth argues the trial court deprived him of “his Sixth Amendment right to a jury trial by aggravating his sentence based upon judicially found facts.” (Appellant’s Br. at 26.) Toth is incorrect.<sup>15</sup>

The court may impose any sentence authorized by statute and permissible under the state constitution “regardless of the presence or absence of aggravating circumstances or mitigating circumstances.” Ind. Code § 35-38-1-7.1(d). If the court finds aggravating circumstances or mitigating circumstances, it must include “a statement of the court’s reasons for selecting the sentence that it imposes.” Ind. Code § 35-38-1-3.

Both the trial court’s statement at sentencing and its written sentencing order include the court’s reasons for imposing an aggregate ten-year sentence. The trial court called Toth’s criminal history “serious,” (App. at 39), and noted his “history of criminal and delinquent activity encompasses a period in excess of 30 years.” (*Id.*) His criminal history includes nine probation violations and one pre-trial release violation. Substance abuse treatment was offered to Toth on three prior occasions and resulted in “at least 7 prior violations of those court orders for substance abuse treatment and programming.”

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<sup>14</sup> We note one or more pages of Toth’s argument on sentencing appear to be missing from his brief. *See* Appellant’s Br. at 27-28.

<sup>15</sup> The Sixth Amendment requires a jury to determine beyond a reasonable doubt the existence of aggravating factors used to increase a sentence above the presumptive sentence assigned by the legislature. *Blakely v. Washington*, 542 U.S. 296, 301 (2004), *reh’g denied* 542 U.S. 961 (2004). In *Smylie v. State*, 823 N.E.2d 679, 686 (Ind. 2005), *cert. denied* --- U.S. ---, 126 S.Ct. 545 (2005), our Indiana Supreme Court held *Blakely* applies to Indiana’s sentencing scheme, and thus requires “the sort of facts envisioned by *Blakely* as necessitating a jury finding must be found by a jury under Indiana’s existing sentencing laws.” In April 2005, the legislature amended Indiana’s sentencing statutes in light of *Blakely* and *Smylie*, replacing presumptive sentences with advisory sentences. All of Toth’s crimes and all of the proceedings flowing therefrom occurred after the sentencing statutes were amended and, accordingly, the revised sentencing scheme applies. Therefore, Toth’s Sixth Amendment argument fails.

(*Id.*) Toth's "ongoing substance abuse issues" were listed as the sole mitigating circumstance. (*Id.*) The trial court determined the "aggravating factors very substantially outweigh the mitigating factor." (*Id.*) The trial court complied with Ind. Code § 35-38-1-3 and sentenced Toth appropriately.

### **CONCLUSION**

The trial court did not abuse its discretion by admitting evidence seized in Toth's house or by permitting Myers to testify Toth told her he had "snapped" the necks of two people in Florida. The evidence was sufficient to sustain his conviction of possession of paraphernalia. The trial court did not err in sentencing Toth. Accordingly, we affirm.

Affirmed.

MATHIAS, J., and NAJAM, J., concur.